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No. _____

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In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANCISCO AVILES-PEREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Must the Government establish each element of the offense of a violation of Title 21 USC §848 (Continuing Criminal Enterprise) without the use of an uncorroborated statement of the defendant where the crime involves no tangible *corpus delicti*? The Petitioner contends that ruling of the Ninth Circuit in this case is in direct conflict with the holding of the court in *Smith v. United States,* (1954) 348 U.S. 147 wherein it was held that the Government must produce corroborative evidence to the defendant's admission in order to show that a crime has been committed where the crime involved no tangible injury which can be isolated as a *corpus delicti.* That was not done in this case. The court of appeals affirmed the Petitioner's conviction stating that the defendant's admission "did not require corroboration."

The Petitioner requests this court to determine whether the holding in *Smith v. United States* and the Due Process and Self Incrimination Clauses of the Fifth Amendment of the United States Constitution require such corroborative evidence under the facts of this case.

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No. _____

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FRANCISCO AVILES-PEREZ,

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v.

UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, FRANCISCO AVILES-PEREZ, respectfully prays that a Writ of Certiorari issue to reverse the Judgment and Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit entered April 26, 1984.

The Petitioner has been sentenced to a combined term of 30 years and is presently in custody in the Federal Correctional Institution in El Reno, Oklahoma.

I.
OPINION BELOW

A copy of the Opinion of the United States Court of Appeals is set forth as Appendix "A" to this Petition.

II.
JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1984. The jurisdiciton of this Court is invoked under Title 28 United States Code Section 1254.

III.
STATEMENT OF THE CASE

The Petitioner was charged by way of Indictment in Count I with conspiracy to distribute and possession with intent to distribute a narcotic drug controlled substance in violation of Title 21 U.S.C. § §841(a)(1), 846; in Count II with a violation of Title 21 U.S.C. §848 (Continuing Criminal Enterprise); in Count III with possession with intent to distribute a Schedule 1 narcotic drug controlled substance; in Count IV with possession with intent to distribute a controlled substance on or about October 26, 1982 along with co-defendant, CESAR ONTIVEROS LUCERO, also known as MOISES TERAN LOPEZ (hereinafter referred to as "MOISES TERAN"); in Counts VI, VII, VIII, IX, and X, with possession with intent to distribute; and in Counts XI and XII with using a telephone in committing narcotics felonies (C.R. 2).

On February 1, 1983, the trial commenced. On February 7, 1983 the Petitioner filed Proposed Jury Instructions (C.R. 175). On February 11, 1983 the jury found the Petitioner guilty on Counts I, II, III, VI, VII, VIII, IX, X, XI and XII and not guilty on Count IV. The jury found the co-defendant, MARIA CICAIROS, not guilty on all counts.

The charges against the co-defendant, FELIX GOMEZ, were dismissed by the Government prior to trial (C.R. 128). The co-defendant, JUAN MANUEL LOPEZ, plead guilty to the use of the communication facility used to commit a narcotis felony (not allegedly involving the Petitioner, AVILES-PEREZ) prior to trial (C.R. 125). The co-defendant, LUCIANO LOPEZ-LOPEZ, plead guilty to conspiracy to violate narcotics laws prior to trial (C.R. 124). The co-defendant, ANTONIO MEZA and SOSIMO CHAVIRA MORENO were and are fugitives.

The remaining co-defendants, MOISES TERAN, JOAQUIN LIZARRAGA, MARCOS MEZA, SECUNDINO CORNEL LOPEZ, and AURELIO ACOSTA, were found guilty on all Counts charged against them.

On March 7, 1983, the Petitioner, AVILES-PEREZ, was sentenced on Counts I and II to a concurrent term of 15 years on each count; on Counts III, VI, VII and Counts VIII, IX, and X to a concurrent term of 15 years to run consecutive to Counts I and II; four years each on Counts XI and XII to run concurrent to the other counts and a special parole term of life. The total term on all counts is 30 years. The defendant has remained in custody since the date of his arrest on October 26, 1982. The Petitioner, AVILES-PEREZ, timely filed a Notice of Appeal.

The appeal was argued on April 3, 1983 and the Court of Appeals filed its Memorandum Opinion on April 26, 1984, a copy of which is attached hereto as Appendix "A". The Court of Appeals reversed the Petitioner's conviction on Count I (conspiracy) and affirmed his conviction on the remaining Counts.

IV.

STATEMENT OF FACTS

The trial commenced on February 1, 1983. The evidence presented at the trial in this case consisted primarily of the testimony of the paid government informant, ROBERT ALVAREZ, who participated in various narcotics transactions which were surveilled and monitored by government agents. In addition, various telephone conversations between the Petitioner, AVILES-PEREZ and others, including the informant, were taped from September 14, 1982 to October 26, 1982. In all the volumes of testimony and evidence presented against the Petitioner, however, the Petitioner will demonstrate that the government failed to show, beyond a reasonable doubt, the key element of a violation of §848 that the Petitioner supervised and/or managed at least five persons in the commission of at least three felony narcotics violations.

Through the testimony of informant ROBERT ALVEREZ, the Government presented evidence that on July 2, 1982 at the Lumenaires Restaurant the co-defendant, MOISES TERAN sold the informant heroin (RT 54 and 58). The Petitioner, AVILES-PEREZ was not present at this sale. Mr. Alvarez also testified that on July 23, 1983 the co-defendant, MOISES TERAN, sold the informant heroin and again the Petitioner, AVILES-PEREZ, was not present (RT 67). The informant testified that during these transactions the co-defendant, MOISES TERAN, told the informant that the heroin belonged to both MR. AVILES and to himself (RT 60). The co-defendant MOISES TERAN was the one who quoted the prices for the heroin to the informant (RT 59). There was no other evidence presented of any narcotics transaction involving the co-defendant MOISES TERAN after this date. At the time of the arrest of MOISES TERAN on October 26, 1982, 407 grams of heroin was seized from his residence. Count 4 of the Indictment

charges the Petitioner, AVILES PEREZ and MOISES TERAN with joint possession of these narcotics. The Petitioner, AVILES-PEREZ was found not guilty of this charge.

The informant ROBERT ALVAREZ testified that on September 2, 1982 he contacted Petitioner, AVILES-PEREZ to purchase heroin and that Petitioner sent co-defendant LUCIANO LOPEZ who sold the informant the heroin (RT 76). He testified that on September 15, 1982 the co-defendant LUCIANO LOPEZ called the informant and told him that he had disassociated himself from the Petitioner, AVILES-PEREZ (RT 86). There was no other evidence presented of any narcotics transaction involving the co-defendant LUCIANO LOPEZ.

The informant testified that the co-defendant AURELIO ACOSTA offered at one time to sell the Petitioner AVILES some cocaine but never did (RT 124). The testimony clearly indicates, and, the Government in essence conceded that the co-defendant AURELIO ACOSTA was not working for nor managed or supervised by the Petitioner AVILES-PEREZ. (See RT 128, 211, 1342-1348, 1376). At best, ACOSTA was a customer of the Petitioner AVILES-PEREZ.

The co-defendant, MARIA CICAIROS was found not guilty of participating in any narcotics violations and there was no evidence that she was managed or supervised by the Petitioner AVILES-PEREZ. The government was unable to show beyond a reasonable doubt that she was involved in the conspiracy or possessed any narcotics.

Likewise, there was no reference to the co-defendants FELIX GOMEZ (against whom the charges were dismissed by the Government) or JUAN MANUEL LOPEZ (who entered a plea to the use of a telephone in the commission of a felony without reference to the Petitioner, AVILES-PEREZ).

The evidence presented against the co-defendant, SECUNDINO CORNEL LOPEZ, at best, indicated that he was a customer of the Petitioner, AVILES-PEREZ. There was no evidence that he worked for or was managed or supervised by the Petitioner, AVILES-PEREZ (RT 1349, 1354-1358).

The evidence presented against the co-defendant, JOAQUIN LIZARRAGA indicated that he worked for the Petitioner AVILES-PEREZ as a gofer, hired by the Petitioner's wife and paid $20.00 per day. However, there was insufficient evidence to demonstrate that he was involved in any drug transactions (See RT Supplement to February 9, 1983 p. 16-27 and Appellant's Opening Brief submitted by Defendant-Appellant LIZARRAGA on file herein). The co-defendant LIZARRAGA was seen with the Petitioner AVILES-PEREZ, was observed doing gardening and odd jobs for the Petitioner and stayed at the Petitioner's home, sleeping in the livingroom, but the evidence failed to demonstrate that he either provided contraband to or received money for contraband for Mr. AVILES-PEREZ.

The evidence against the co-defendant, ANTONIO MEZA indicated that he provided the Petitioner AVILES-PEREZ with contraband which AVILES-PEREZ sold to the informant (RT 151-152). He was allegedly seen in the company of the Petitioner, AVILES-PEREZ but the evidence showed that he didn't even know where the Petitioner AVILES-PEREZ lived (RT 151-152, 1225). There was no evidence that the co-defendant ANTONIO MEZA was managed by or worked for the Petitioner.

The Petitoner concedes that the evidence did show that the co-defendants SOSIMO CHAVIRA (also known as TOTO) and MARCOS MEZA were working for the Petitioner in the alleged narcotic transactions and were under his management.

The only other reference at the trial to persons who were allegedly working for the petitioner involved an uncorroborated statement by the petitioner that "two brothers of LUCIANO LOPEZ had worked for him" (RT 104, 212, 303). There was no evidence whatsoever, independent from the petitioner's statement, that showed or indicated that these "two brothers" worked for the Petitioner or ever were involved in narcotics transactions. Most importantly, the Government referred to these "two brothers" in closing argument as part of the five required persons managed by the Petitioner (RT 1385).

The Petitioner objected to the use of this testimony (RT 942). On February 7, 1983, the Petitioner submitted the following Jury Instructions to the Court:

"CORPUS DELICTI

> Before the Jury makes a determination as to whether each element of the crimes charged is proved beyond a reasonable doubt, it must determine whether the prosecution has established each element of the case without the use of an uncorroborated admission by a defendant. Thus, if the only evidence presented, as to one or more of the elements of the crime, is the admission of a defendant which is uncorroborated by independent evidence, the jury must return a verdict of not guilty.
>
> An admission is not "corroborated" by independent evidence unless there is substantial evidence of the existence of all the elements of the crime independent of the admission of a defendant.
>
> Based upon: *Smith vs. United States* (1954) 348 U.S. 156, 157."

The trial court refused to give this instruction (RT Supplemental Volume 207).

On February 11, 1983 the jury convicted the Petitioner on all counts charged except Count 4. On March 7, 1983, the Petitioner was sentenced to a total term of 30 years imprisonment. The Petitioner timely filed a Notice of Appeal.

On April 26, 1984 the Court of Appeals reversed the Petitioner's conviction on Count I (Conspiracy) and affirmed his conviction on the remaining counts. The Court of Appeals affirmed his conviction on Count II (Continuing Criminal Enterprise) by stating that the Petitioner's statement regarding the "two brothers" needed no corroboration.

V.

ARGUMENT

THE NINTH CIRCUIT COURT OF APPEALS ERRED IN FAILING TO FOLLOW THE HOLDING OF THE COURT IN *SMITH V. UNITED STATES* (1954) 348 U.S. 147 BY FINDING THAT THE DEFENDANT'S ADMISSION DID NOT NEED CORROBORATION.

As set forth in the Statement of Facts herein, the Petitioner contends that the government failed to show that the Petitioner managed at least five persons in a series of violations which is an essential element of the violation of Title 21 U.S.C. §848 (Continuing Criminal Enterprise).

The co-defendants, MARIA CICAIROS (who was found not guilty), FELIX GOMEZ, and JUAN MANUEL LOPEZ can be eliminated as there was no evidence presented to prove that they worked for the Petitioner.

The co-defendnats, AURELIO ACOSTA and SECUNDINO LOPEZ were at best, customers of the Petitioner, and not supervised and/or managed by him. Therefore, they can be eliminated.

The evidence with respect to the co-defendant, MOISES TERAH showed that he was, if anything, an equal partner to the Petitioner and was not managed by him. He admitted that the heroin belonged to both of them at the July 2 and July 23 sale and he was the one who quoted the prices. More importantly, the jury evidently did not believe that the co-defendant MOISES TERAH was controlled or managed by the Petitioner as they found the Petitioner not guilty in having any constructive possession of the narcotics found in the home of MOISES TERAN. Therefore, he can be eliminated.

Likewise, there is insufficient evidence that the co-defendant, ANTONIO MEZA, was supervised and/or managed by the Petitioner. He allegedly provided the Petitioner with contraband on one occasion and was seen with the Petitioner but there was no evidence that he was managed by him. Indeed, ANTONIO MEZA, didn't even know where the Petitioner lived.

The co-defendant, LIZARRAGA admittedly did odd jobs and gofer work for the Petitioner but there was insufficient evidence that he did any work for the Petitioner in any narcotics transactions. He was allegedly present when the Petitioner told his nephew SOSIMO to get some heroin and was allegedly standing around when SOSIMO gave the informant the heroin but there was insufficient evidence to demonstrate, beyond a reasonable doubt, that he participated in any narcotics transactions (See Appellant LIZARRAGA's Opening Brief).

All that are left are MARCOS MEZA, SOSIMO, LUCIANO LOPEZ, and the "two brothers". The Petitioner concedes

that the evidence showed that MARCOS MEZA, SOSIMO and LUCIANO were managed by the Petitioner on various narcotics transactions, however, these three are not enough for a conviction of § 848.

The Petitioner respectfully contends that the jury could not rely on the uncorroborated statement of the Petitioner that "LUCIANO's two brothers" used to work for him in finding the Petitioner guilty of a violation of § 848.

In case of *Smith v. United States* (1954) 348 U.S. 147, 99 L.Ed. 192 the U.S. Supreme Court was presented with the question of whether the Government is required to provide corrobrative evidence independent of the defendant's admission where there is no tangible injury which can be isolated as a *corpus delecti.* The court answered the question in the affirmative stating:

> "The first issue is whether the requirement of corroboration may properly be applied to the crime of tax evasion. The corroboration rule, at its inception, served an extremely limited function. In order to convict of serious crimes of violence, then capital offenses, independent proof was required that *someone* had indeed inflicted the violence, the so-called corpus delecti. Once the existence of the crime was established, however, the guilt of the accused could be based on his own otherwise uncorroborated confession. But in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delicti.* As to this crime, it cannot be shown that the crime has been committed without identifying the accused. Thus we are faced with the choice either of applying the corroboration rule to this offense and according the accused even greater protection than the rule affords to a defendant in a homocide prosecution. *Evans v. United States,*

122 F.2d 461; *Murray v. United States,* 53 App. D.C. 119, 288 F.1008, or of finding the rule wholly inapplicable because of the nature of the offense, stripping the accused of this guarantee altogether. *We choose to apply the rule, with its broader guarantee, to crimes in which there is no tangible corpus delicti, where the corroborative evidence must implicate the accused in order to show that a crime has been committed."* (*Supra* at 154. Citations omitted. Emphasis added.)

The Court in *Smith* went on to say:

"There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance *as long as there is substantial independent evidence that the offense has been committed,* and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. (Citations omitted.)

In addition to differing views on the substantiality of specific independent evidence, the debate has centered largely about two questions: (1) whether corroboration is necessary for all elements of the offense established by admissions alone, compare *Ercoli v. United States, supra,* and *Pines v. United States, supra,* with *Wynkoop v. United States, supra,* and *Pearlman v. United States,* 10 F.2d 460, and (2) whether it is sufficient if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged, compare *Pearlman v. United States, supra* and *Daeche v. United States,*

> *supra,* with *Pines v. United States, supra*, and *Forte v. United States, supra.* We answer both in the affirmative. *All elements of the offense must be established by independent evidence or corroborated admissions,* but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense "through" the statements of the accused." *Supra,* at 156. (Emphasis added.)

Thus, where the Government relies upon the admission of the Defendant to prove the crime charged, they must show substantial independent evidence that all elements of the offense have been committed. The violation of § 848 and its requirement of five persons, like income tax evasion, is a crime where there is no tangible injury which can be isolated as the *corpus delicti.* Nonetheless, the defendant is entitled to the broader guarantee that the corroborative evidence must implicate the accused in order to show that the crime is committed. The corroboration rule applies to admissions made by the defendant in the course of the commission of the offense or in the course of investigation as well as to confessions. See *United States v. Hallman,* (9th Cir. 1979) 594 F.2d 198 at 201; *United States v. Ketzman,* (8th Cir. 1975) 520 F.2d 1400 at 1404.

In the matter before this court, the government attempted to rely upon the totally uncorroborated admission of the petitioner that the "two brothers" of LUCIANO LOPEZ had worked for him in showing the necessary five persons. There was absolutely no evidence, let alone substantial evidence, outside of the statement, that these "two brothers" had anything to do with the petitioner or were involved in narcotics trafficking. They were never identified,

seen, nor heard from throughout the entire investigation of this case.

The trial court below refused to instruct the jury under *Smith v. United States,* that they must find independent corroborative evidence of the admission. Without this instruction, they may well have erroneously relied upon this admission in finding the necessary five persons particularly since the prosecutor affirmatively argued to the jury that the "two brothers" should be counted as part of the five necessary persons.

The Court of Appeals ruled that "Aviles-Perez's statement did not require corroboration. It was neither a confession nor an admission of a critical fact made to an official charged with investigating the crime. *See id.* at 155. Because the admission was made to an informant during the course of commission of the crime, it carried 'a strong inference of reliability.' *Kaneshiro v. United States,* 445 F.2d 1266, 1270 (9th Cir.), *cert. denied,* 404 U.S. 992 (1971). *See also Smith,* 348 U.S. at 155 n.3; *Budford v. United States,* 272 F.2d 483, 486 n.1 (9th Cir. 1959). The jury was thus entitled to consider the admission without corroboration. Moreover, even if we assumed corroboration were required, the Government produced ample evidence of Aviles-Perez's supervision of more than five persons."

The Ninth Circuit ruled in *United States v. Hallman,* (1979) 594 F.2d 198, that the corroboration rule applied to statements made in the course of the commission of the offense and during the investigation.

The ruling in *Hallman* is supported by a long line of cases. In *United States v. Fearn,* 589 F.2d 1316 (7th Cir. 1978) the Court stated: "It is a settled principle of the administration of criminal justice in the Federal Courts that a conviction must rest upon firmer ground than the

uncorroborated admission or confession of the accused." Citing *Wong Sun v. United States,* 371 U.S. 471, 488-89, 83 S.Ct. 407, 9 L.Ed 2d 441 (1963); *United States v. Bukowski,* 435 F.2d 1094, 1105 (7th Cir. 1970), *cert. denied,* 401 U.S. 911, S.Ct. 874, 27 L.Ed 2d 809 (1971).

In *Opper v. United States,* 348 U.S. 84, 89-90, 75 S.Ct. 158, 162, 99 L.Ed 101 (1954) the Court added:

"The need for corroboration extends beyond complete and conscious admission of guilt — a strict confession . . . [S]tatements of the accused out of court that show essential elements of the crime . . . necessary to supplement an otherwise inadequate basis for a verdict of conviction . . . have the same possibilities for error as confessions. They, too, must be corroborated." *Supra* at 91.

The Petitioner respectfully contends, therefore, that the Court of Appeal's ruling that Petitioner's statement needs no corroboration merely because it was made during the course of the commission of the offense, is without merit and in conflict with the above cited authorities.

Secondly, the statement required corroboration as the circumstances under which the Petitioner's statement was made were not inherently reliable. As is evident from the record herein, the defendant made the statement when he was in a bar with MR. ALVAREZ. He had just been informed by MR. ALVAREZ that LUCIANO LOPEZ had disassociated himself from AVILES-PEREZ and was allegedly selling heroin to ALVAREZ without AVILES-PEREZ. AVILES-PEREZ was apparently angry at LOPEZ and somewhat embarrassed and under these circumstances boasted to ALVAREZ that, well, "LOPEZ had been working for him for two years and that two of LOPEZ' brothers had also worked for him doing the same thing."

In the *United States v. Northrup,* 482 F.Supp. 1032 (D.C. Nev. 1980) the Court found that under similar circumstances, such statements were not inherently trustworthy. The Court stated "I must start from the basic black letter law that an accused cannot be convicted of a crime based upon his own uncorroborated confession of [sic] admission; all elements of an offense must be established by independent evidence or corroborated admissions." *supra* at 1036. Citing *United States v. Micieli,* 594 F.2d 102, 108 (5th Cir. 1979); *Lindsay v. United States,* 542 F.2d 755, 756 (8th Cir. 1976); *United States v. Charpentier,* 438 F.2d 721, 724 (10th Cir. 1971).

The Petitioner respectfully contends, therefore, that the corroboration rule does not apply to the within statements and that there was no independent evidence admitted which corroborated these statements. The ruling of the Court of Appeals that no corroboration is needed under these facts is in conflict with the holding of the Court in *Smith v. United States, supra,* and violates the defendant's right to due process of law and the defendant's right against self-incrimination. It is important for this Court to grant the Writ of Certiorari in order to clarify the applicability of the doctrine set forth in *Smith* to the facts of this case.

VII.

REASONS FOR GRANTING WRIT

The constitutional questions raised by Petitioner concern the due process clause and self-incrimination clause of the Fifth Amendment to the United States Constitution.

As indicated previously, it is Petitioner's contention that the Ninth Circuit Court of Appeals committed error of constitutional dimension when it found that the de-

fendant's admission needed no independent corroboration where the admission established a key element of the prosecution's case, was made during the course of the investigation of the case and where the crime involved no tangible *corpus delicti.* The clarification of the standard of applicability of the doctrine set forth in *Smith v. United States* is an important question for the administration of criminal justice in the federal courts.

VIII.
CONCLUSION

For the reasons given, Certiorari should be granted and the Judgment on Count II reversed.

DATED: June 26, 1984

Respectfully submitted,
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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARCOS MEZA, JOAQUIN LIZARRAGA, FRANCISCO AVILES-PEREZ, MOISES LOPEZ-TERAN, Defendants-Appellants.	Nos. 83-5053, 83-5054, 83-5060, 83-5094 D.C. Nos. CR 82-930-6-R, CR 82-930-5-R, CR 82-930-01-R, CR 82-930-(A)-2-R **MEMORANDUM**

Appeal from the United States District Court
For the Central District of California
The Honorable Manuel L. Real, Presiding
Argued and Submitted April 3, 1984

Before: KILKENNY, HUG, and BOOCHEVER, Circuit Judges.

Appellants were convicted for their participation in a heroin distribution scheme. Each appellant was convicted of conspiracy to possess and distribute controlled substances. Aviles-Perez was also convicted of conducting a continuing criminal enterprise, 21 U.S.C. § 848; of using a telephone to facilitate commission of a felony, 21 U.S.C. § 843(b); and of six counts of possession or distribution, 21 U.S.C. § 841(a)(1). Lopez-Teran was also convicted of three counts of possession or distribution. Meza and Lizarraga were convicted of one count each of distribution. We reverse Aviles-Perez's conviction for conspiracy, but affirm all of the remaining convictions.

1. *Aviles-Perez's Appeal*

Aviles-Perez contends the district court erred in refusing to give a jury instruction based on *Smith v. United States,* 348 U.S. 147 (1954). *Smith* stated the general rule that "an accused may not be convicted on his own uncorroborated confession." *Id.* at 152. Aviles-Perez wanted the jury instructed that the Government could not establish his employment of five or more persons in the continuing criminal enterprise solely by use of his uncorroborated statement that he had employed the two Lopez brothers.

Aviles-Perez's statement did not require corroboration. It was neither a confession nor an admission of a critical fact made to an official charged with investigating the crime. *See id.* at 155. Because the admission was made to an informant during the course of commission of the crime, it carried "a strong inference of reliability." *Kaneshiro v. United States,* 445 F.2d 1266, 1270 (9th Cir.), *cert. denied,* 404 U.S. 992 (1971). *See also Smith,* 348 U.S. at 155 n.3; *Buford v. United States,* 272 F.2d 483, 486 n.1 (9th Cir. 1959). The jury was thus entitled to consider the admission without corroboration. Moreover, even if we assumed corroboration were required, the Government produced ample evidence of Aviles-Perez's supervision of more than five persons.

Aviles-Perez also challenges his conviction for conspiracy. The Government concedes that conspiracy is a lesser included offense of the continuing criminal enterprise charge. *See Jeffers v. United States,* 432 U.S. 137, 150-51 (1977); *United States v. Smith,* 690 F.2d 748, 750 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 1435 (1983). Because conviction on both counts violates the double jeopardy clause, we reverse the conviction for conspiracy.

2. *Lopez-Teran's Appeal*

Lopez-Teran sought suppression of heroin seized in a search of his home. His first suppression motion contended material in the warrant affidavit was stale and did not provide probable cause to believe evidence could be found in his home. The information on which the magistrate relied was not stale. Although Lopez-Teran's contacts with the informant terminated in July 1982, the warrant affidavit indicated his continued contact with the distribution scheme after that date. In August he resided in an apartment believed to be used to store controlled substances. In September and October he was believed to be in telephone contact with Aviles-Perez, and a vehicle registered to him was seen at locations associated with Aviles-Perez. The affidavit contained information linking Lopez-Teran to an ongoing criminal organization and therefore was not stale. *See United States v. Foster,* 711 F.2d 871, 878 (9th Cir. 1983).

The affidavit also supported a finding of probable cause to believe evidence could be found in Lopez-Teran's home. The change of residence did not undercut this finding. Business records and surveillance indicated the Claremont house was Lopez-Teran's residence. His former residence may have been used to store controlled substances, and he still was associated with members of the conspiracy. The magistrate was also entitled to rely on the affiant's assertion that narcotics dealers often keep evidence of trafficking in their homes. *See United States v. Stefanson,* 648 F.2d 1231, 1236 (9th Cir. 1981); *United States v. Johnson,* 641 F.2d 652, 659 (9th Cir. 1980).

Lopez-Teran's second motion claimed that omission of one fact from the warrant affidavit required suppression of evidence seized from his home. Lopez-Teran was entitled to an evidentiary hearing only if the omission was material. *United States v. Flores,* 679 F.2d 173, 176 (9th

Cir. 1982), *cert. denied,* 103 S.Ct. 791 (1983); *United States v. Maher,* 645 F.2d 780, 782 (9th Cir. 1981). If probable cause would still exist if the omitted fact were considered together with the information in the affidavit, the warrant may not be traversed. *United States v. Kunkler,* 679 F.2d 187, 191 (9th Cir. 1982). Lopez-Teran was also required to make a substantial preliminary showing that the omission was deliberate or made in bad faith. *United States v. Brooklier,* 685 F.2d 1208, 1221 (9th Cir. 1982), *cert. denied,* 103 S.Ct. 1194 (1983). He has satisfied neither of these requirements.

Even if the magistrate had considered the omitted statement, the probable cause finding could have been based on Lopez-Teran's long-standing relationship with Aviles-Perez and the fact that Lopez-Teran maintained contact with the conspirators after September 15. The materiality of the omission thus was not established. In addition, there was no showing that the omission was more than negligent. The warrant affidavit in no way masked the fact that Lopez-Teran's known deliveries of heroin occured in July and that his role in the scheme may have been modified after that date. The affiant stated the opinion that another conspirator had become Aviles-Perez's "primary errand runner." In view of the large amount of information the affiant communicated to the magistrate, bad faith cannot be inferred from this omission.

3. *Meza's Appeal*

Meza contends he was tried 89 days after his indictment in violation of the Speedy Trial Act, 18 U.S.C. § § 3161-3174. This contention is without merit. More than enough pretrial dates were automatically excludable under 18 U.S.C. § 3161(h)(1) to bring the trial within the 70-day limit. Those dates include, but are not limited to, Lopez-Teran's arraignment (1 day); the motion to reduce bond (5

days); the motion for voice and handwriting exemplars (4 days); the motions for discovery, severance, and bill of particulars (11 days); and the motion for grand jury testimony (3 days). In addition, time required to dispose of motions made by Meza's codefendants would also be excludable as to him. *See United States v. Van Brandy,* No. 83-5082, slip op. at 933-34 (9th Cir. Feb. 22, 1984).

4. *Lizarraga's Appeal*

Lizarraga claims there was insufficient evidence to support his convictions. We disagree. On the distribution charge, the evidence showed that Lizarraga accompanied Aviles-Perez and Chavira to a restaurant to meet Alvarez. Aviles-Perez and Alvarez, sitting at a separate table, negotiated the sale. Aviles-Perez related some of Alvarez's comments to Lizarraga. He then instructed Lizarraga and Chavira to weigh out 1 1/2 ounces of heroin and deliver it to Alvarez. Surveillance indicated Lizarraga drove to a location where heroin had been picked up earlier. When he returned, Alvarez and Aviles-Perez approached the car and either Chavira or Lizarraga handed Alvarez the heroin. This evidence is clearly sufficient for a rational juror to conclude Lizarraga participated in the September 15, 1982 distribution. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

There is also ample evidence of Lizarraga's participation in the conspiracy. He facilitated the drug distribution by driving, running errands, and renting motel rooms. He was present on October 10 when Alvarez paid Aviles-Perez for two ounces of heroin and Aviles-Perez made arrangements for the delivery. He was also present on October 25 when a delivery was negotiated, and he apparently set out with Aviles-Perez and Meza to get the heroin ordered by Alvarez. Viewed in the light most favorable to the prosecution, this evidence suggests

Lizarraga played a minor role in the conspiracy and is sufficient to support his conviction.

Aviles-Perez's conviction on the conspiracy charge is REVERSED. Each of the remaining convictions is AFFIRMED.*

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on June 26 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, U.S. Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original and 40 copies)

Solicitor General
Department of Justice
Washington, D.C. 20530
(3 copies)

Assistant U.S. Attorney
Daniel J. Gonzales
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 26, 1984, at Los Angeles, California.

Robin J. McColgan
(Original signed)